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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2001

STATE OF OHIO,
Petitioner,

-vs-

ANGEL M. TORR,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS, TENTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether an appellate court violates the standard of review for sufficiency of the evidence under ***Jackson v. Virginia***, 443 U.S. 307 (1979), when it finds that the evidence was sufficient to support the guilty verdict on one count but then proceeds to sustain an insufficient-evidence challenge to that count by relying on the trial court's findings regarding another count of the same indictment.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2001

STATE OF OHIO,
Petitioner,

-vs-

ANGEL M. TORR,
Respondent.

Petitioner State of Ohio hereby respectfully petitions for a writ of certiorari to review the decision and judgment of the Ohio Court of Appeals, Tenth Appellate District.

OPINIONS BELOW

The oral verdicts of the Court of Common Pleas of Franklin County, Ohio, are not reported, but they are contained in an excerpt of the trial transcript. (**Appendix F** at 53-55) The written verdict and judgment entry of the common pleas court are set forth in **Appendix G** and **Appendix H**, respectively. (Appx. at 55, 56)

The opinion of the Ohio Court of Appeals, Tenth Appellate District, which reduced respondent Angel Torr's felony child endangering conviction to a misdemeanor, is available on the Ohio Supreme Court website (www.sconet.state.oh.us) under "webcite" number 2002-Ohio-524 and on LEXIS at 2002 Ohio App. Lexis 89. The opinion and accompanying judgment are set forth in **Appendix A** and **Appendix B**, respectively. (Appx. at 29-44, 45)

The unreported memorandum decision and journal entry of the Ohio Court of Appeals denying reconsideration are set forth in **Appendix C** and **Appendix D**. (Appx. at 46-49, 50)

The entry of the Ohio Supreme Court declining discretionary review is reported at 95 Ohio St.3d 1485, 769 N.E.2d 402 (2002). It is set forth in **Appendix E**. (Appx. at 51)

JURISDICTIONAL STATEMENT

Petitioner, the State of Ohio, seeks review of a judgment of the Ohio Court of Appeals, Tenth Appellate District, entered on January 15, 2002. In a journal entry and memorandum decision rendered on April 30, 2002, the Ohio Court of Appeals denied petitioner State of Ohio's timely application for reconsideration. The Ohio Supreme Court declined the State of Ohio's request for discretionary review in an entry filed on June 12, 2002. This petition for writ of certiorari was timely filed within ninety days of the latter date.

Section 1257(a) of Title 28 of the United States Code confers jurisdiction on this Court to review the judgment of the Ohio Court of Appeals by writ of certiorari. This petition addresses the federal question of whether the Ohio Court of Appeals was correct as a matter of federal Due Process to sustain a challenge to the sufficiency of the evidence on felony child endangering. The Ohio Court of Appeals did not rely on any independent state ground in making its ruling.

The judgment of the Ohio Court of Appeals is a "final judgment" within the meaning of Section 1257(a). Given the limited remand only allowing a resentencing on the reduced misdemeanor child endangering offense, which would merely result in a sentence for time served, no significant further

proceedings will occur on remand. A judgment is considered "final," even though further proceedings will occur on remand, when those further proceedings have a preordained result, and here the result is preordained by the appellate court's ruling. ***Florida v. Thomas***, 532 U.S. 774, 777-78 (2001); ***Pope v. Atlantic Coast Line R.R.***, 345 U.S. 379, 382 (1953).

Finally, a writ of certiorari would be properly directed to the Ohio Court of Appeals, as opposed to the Ohio Supreme Court. The latter court merely declined discretionary review and therefore expressed no opinion on the merits. *See* Ohio Supreme Court Rules of Practice, Rule II(1)(A)(2) & (A)(3), and Rule III(6)(A) & (B); Ohio Supreme Court Rules for Reporting of Opinions, Rule 8(B); *see also*, ***American Railway Express Co. v. Levee***, 263 U.S. 19, 20-21 (1923).

CONSTITUTIONAL PROVISION INVOLVED

In pertinent part, the Fourteenth Amendment provides, as follows:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law * * *.

INTRODUCTION

The Ohio Court of Appeals fundamentally failed to follow the standard of review for sufficiency of the evidence as set forth in ***Jackson v. Virginia***, 443 U.S. 307 (1979). It found the evidence to be sufficient under the proper ***Jackson*** standard, but then it proceeded to find the evidence "insufficient" because of a "specific finding" that the trial court had made in acquitting respondent under another count

of the indictment.

The appellate court had no business considering a "specific finding" under the ***Jackson*** standard, which is limited to determining whether the evidence was adequate to allow *any* rational factfinder to find the defendant guilty. As ***Jackson*** states:

> The question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached. Just as the standard announced today does not permit a court to make its own subjective determination of guilt or innocence, it does not require scrutiny of the reasoning process actually used by the factfinder—if known.

Jackson, 443 U.S. at 319 n. 13. As further stated in ***United States v. Powell***, 469 U.S. 57, 67 (1984):

> [W]e note that a criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. *This review should not be confused with the problems caused by inconsistent verdicts.* Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt. *This review should be independent of the jury's determination that evidence on another count was insufficient.* (Emphasis added; citations omitted)

The same standard of sufficiency review applies to jury trials and bench trials. ***Jackson***, 443 U.S. at 317 n. 8.

The appellate court's error provides a rare case under almost laboratory conditions for this Court to review this question. In most cases where an appellate court might refer to or rely on a "specific finding," one would not expect the appellate court to first say that the evidence was sufficient. In most cases, there would be a question whether the reference to a "specific finding" made any difference.

Here, the difference is profound. The appellate court expressly found that the evidence was sufficient. Then it erred by relying on a "specific finding" to find the evidence "insufficient." Such circumstances provide a rare opportunity for this Court to restate the limits of sufficiency review under ***Jackson*** in a case where such restatement will make a clear-cut difference.

This Court has not hesitated to accept and even summarily reverse cases in which the state appellate court committed obvious error under this Court's precedents. *See, e.g.*, ***Kirk v. Louisiana***, 536 U.S. ___ (2002). This case calls for similar treatment.

STATEMENT OF THE CASE

The grand jury indicted respondent Angel Torr on counts of involuntary manslaughter and felony child endangering. The child endangering count (Count Two) alleged that respondent had recklessly created a substantial risk to the health or safety of her five-year-old son William Welch by violating a duty of care, protection, or support. Ordinarily, such an offense is a first-degree misdemeanor, but when the offense "results in serious physical harm to the child," the offense is elevated to a third-degree felony. O.R.C. 2919.22(E)(2)(c). The indictment against respondent alleged

the resulting-serious-physical-harm element to raise the offense to a third-degree felony.[1]

The count of involuntary manslaughter (Count One) alleged that respondent had caused the death of William Welch as a "proximate result" of the felony child endangering offense.[2] The indictment alleged that the date of both offenses

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[1] In pertinent part, the child endangering statute (O.R.C. 2919.22) states, as follows:

> (A) No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support. * * *
>
> * * *
>
> (E)(1) Whoever violates this section is guilty of endangering children.
>
> (2) If the offender violates division (A) * * * of this section, endangering children is one of the following:
>
> (a) Except as otherwise provided in division (E)(2)(b), (c), or (d) of this section, a misdemeanor of the first degree;
>
> * * *
>
> (c) If the violation is a violation of division (A) of this section and results in serious physical harm to the child involved, a felony of the third degree * * *.

[2] In pertinent part, the involuntary manslaughter statute (O.R.C. 2903.04) states, as follows:

was July 5, 2000.

In a bench trial, the State of Ohio presented substantial evidence of respondent's offenses. Briefly summarized, the evidence showed that William had a long-known propensity to play with fire, as shown by the prosecution's evidence that William had set several previous fires, including a substantial fire in the previous March. After the March fire, a fire prevention educator had specifically warned respondent that William's fire-setting behavior would probably continue absent intervention. But defendant had actively avoided or prevented such intervention at every turn, by misleading the fire educator and a children services caseworker about the number of previous fires and by lying to the caseworker about William attending fire-starter classes, when in fact William had not attended any such classes.

Despite knowing of William's long-standing propensity to play with fire, respondent went off to the store on July 5th without William. On the way to the store, respondent told William to return home to check in. But there was no one home to watch William because respondent had told her twelve-year-old half-sister Nicole to deliver a note across the street. Other evidence indicated that Nicole was too immature to undertake babysitting duties regarding William.

Other evidence confirmed that respondent viewed

(A) No person shall cause the death of another * * * as a proximate result of the offender's committing or attempting to commit a felony.

* * *

(C) Whoever violates this section is guilty of involuntary manslaughter. Violation of division (A) of this section is a felony of the first degree. * * *

William as an inconvenience. Neighbor BJ Geiger testified that she overheard respondent tell William earlier on July 5th that he was such a "goddamn mother f***ing inconvenience" that she wished he had died in an earlier fire.

William returned to an empty home as ordered by respondent, and the deadly fire soon started. Although the prosecution could not pinpoint the exact igniting source of the fire that led to William's death, State Fire Marshal Inspector Harry Barber testified that the fire had a human origin. Inasmuch as William was the lone human in the house at the time, the evidence circumstantially pointed solely to him.

Barber rejected the notion that the fire started in the electrical outlet. He also rejected the view that a cigarette on the couch would have caused the fire, since the cigarette would have smoldered for a significant period of time (at least ninety minutes) before reaching flaming intensity. Since respondent, her boyfriend Paul Trout, and Nicole were all present during that time frame, they would have noticed a cigarette smoldering in the couch before they left the apartment, but none of them did. As for the assertion that these three smokers all would have taken their lighters with them, respondent's lack of credibility cut severely against that claim. William was seen with lighters on other occasions, and so respondent's claims of lighter safety were questionable. In the end, William's presence in the home alone and his sole power to start this human-originated fire perforce provided strong evidence that he had the fire-starting equipment to do it.

During closing arguments, the trial court specifically noted that the statute "makes it a third degree felony, if the violation results in serious physical harm * * *." (Tr. 711-12) The court thereafter found respondent guilty of child endangering as a third-degree felony: "I thus find you guilty of

endangering children, in violation of Section 2919.22(A), and under subsection E(1)(c) (*sic*) that is a felony of the third degree." (Appx. at 54) The trial court's written guilty verdict likewise indicated that respondent was guilty as charged of the felony child endangering offense: "Guilty of Count 2 as [s]he stands charged in the Indictment * * * Child Endangering F3." (Appx. at 55) The trial court said the same thing in its judgment entry: "the Court found the Defendant * * * **GUILTY** of **Count Two** of the Indictment to wit: **Endangering Children**, in violation of Section **2919.22** of the Ohio Revised Code, being a **Felony** of the **Third Degree**." (Appx. at 56, emphasis *sic*)

Although finding respondent guilty of the felony child endangering offense, the trial court found respondent not guilty of involuntary manslaughter, saying that the prosecution had not proven beyond a reasonable doubt that "child endangering was the proximate cause of William's death * * *." (Appx. at 54)

On appeal, respondent briefed five assignments of error. The first and second assignments of error challenged the prosecutor's introduction or attempted introduction of certain evidence. The third, fourth, and fifth assignments of error challenged the quantum of evidence to support conviction. In particular, respondent claimed that the evidence did not support conviction on the elements of recklessness and substantial risk. (Brief of Defendant-Appellant, at 2, 26) The third assignment of error claimed that the evidence was legally insufficient, relying on the Due Process standard for sufficiency and citing three times the decision in ***Jackson v. Virginia***, 443 U.S. 307 (1979). (Brief of Defendant-Appellant, at 31-32) The fourth assignment of error claimed that the verdict was against the manifest weight of the evidence. The fifth assignment of error challenged the

common pleas court's overruling of a Oh.Crim.R. 29 motion for judgment of acquittal (which was another insufficient-evidence challenge).

Respondent never claimed in any of her assignments of error or arguments thereunder that the trial court's not-guilty verdict on involuntary manslaughter created reversible error or that the not-guilty verdict was a basis to sustain any of the assignments of error. In fact, respondent's brief made only a fleeting reference to the not-guilty verdict on involuntary manslaughter. (Brief of Defendant-Appellant, at 3)

The prosecution responded by opposing all of respondent's assignments of error. Since the defense was not raising the point, the State did not brief the question of whether the not-guilty verdict on involuntary manslaughter created any reversible error. Insofar as the third, fourth, and fifth assignments of error were concerned, the prosecution noted that the defense was only challenging the recklessness and substantial-risk elements and that the defense was not challenging the evidence regarding the element of resulting serious physical harm (Brief of Plaintiff-Appellee, at 20, 29) Even so, the State briefly addressed the evidence supporting the latter element, concluding that "[t]he evidence was sufficient to show that defendant's child endangering offense resulted in serious physical harm to William." (***Id***. at 29) The prosecution quoted the proper Due Process standard for reviewing sufficiency. (***Id***. at 21)

At the oral argument, the defense briefly mentioned an "inconsistency in verdicts," but the defense eschewed reliance thereon, saying that Ohio law "doesn't really recognize much in the way of inconsistency in verdicts * * *."

On January 15, 2002, the appellate court issued its

opinion. (Appx. at 29-44) The court *rejected* respondent's insufficient-evidence arguments by concluding that the evidence was sufficient to support the recklessness and substantial-risk elements. (Appx. at 39-40) Even though the defense had not challenged the evidence of resulting serious physical harm, the court addressed that issue too, repeatedly saying that the evidence was sufficient to support that element.

- "There is no doubt that she was a parent with custody and control of her five-year-old child and that, if the fire resulted from recklessly violating a duty of care and protection to the child, that it resulted in serious physical harm, *i.e.* death to the child."

- "Considering the evidence most favorable to the state, there was sufficient proof of child endangering which caused the child's death."

- "A reasonable trier of fact could find that the human agency was the child and the source of the fire was a cigarette incendiary or other device or object which had come into possession of the child to be used to start the fire. The substantial risk was created by setting in motion the series of events which led to the serious harm * * *."

- "We find that the evidence was sufficient for the court to find a violation of the felony endangering child statute."

(Appx. at 39-40) Even so, the court went on to *sustain* a sufficiency challenge under the third assignment of error:

> However, there is a problem with the trial court finding appellant guilty of felony child endangering in

> light of the fact that R.C. 2919.22(E)(1)(c) requires the child endangering described in R.C. 2919.22(A) to be the result of serious physical harm to the child. The trial court specifically found that the state had not proved beyond a reasonable doubt that child endangering was the proximate cause of William's death. Thus, the additional element required to convert the first degree misdemeanor for a violation of R.C. 2919.22(A) was lacking and the trial court found appellant guilty of only a violation of R.C. 2919.22(A) which under R.C. 2919.22(E)(2)(c) is a misdemeanor of the first degree. The evidence, as noted, was sufficient to support that offense.
>
> Therefore, we sustain appellant's third assignment of error to the extent that the trial court's judgment of felony child endangering is reversed. The trial court is instructed to revise its judgment entry to show conviction of child endangering under R.C. 2919.22(A), a lesser included offense, and to resentence appellant for violation of a first degree misdemeanor.

(Appx. at 40-41) The appellate court overruled the other assignments of error. The appellate court entered its judgment on January 15, 2002. (Appx. at 45)

On January 24, 2002, the prosecution timely filed consolidated motions for reconsideration, for stay, and for certification of a conflict. The prosecution pointed out several flaws in the opinion, including the flaw in the appellate court's approach to respondent's claim of insufficient evidence. In the prosecution's view, the appellate court's sustaining of the third assignment of error had been based on a perceived inconsistency between the not-guilty verdict on the involuntary

manslaughter count and the guilty verdict on the felony child endangering count. But there was no inconsistency between the verdicts, and, even if there had been, an inconsistency in verdicts provided no basis for sustaining an insufficient-evidence claim. The prosecution stated, as follows:

> [T]his Court improperly used an inconsistent-verdicts approach to sustain the third assignment of error, which was based solely on a claim of insufficient evidence. These are different issues. "The question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached." ***Jackson v. Virginia*** (1979), 443 U.S. 307, 319-20 n. 13. "[R]eview [of sufficiency of the evidence] should not be confused with the problems caused by inconsistent verdicts." ***United States v. Powell*** (1984), 469 U.S. 57, 67; see, also, ***id***. at 61-62 n. 6.
>
> * * *
>
> Page two of this Court's opinion recognized the limits of review for sufficiency of the evidence when it cited ***State v. Jenks*** (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Under ***Jenks***, the test for sufficiency focuses on the evidence admitted at trial to determine whether *any* reasonable trier of fact could have found the defendant guilty. It is a test of the adequacy of the evidence, not a test of the adequacy of a particular factfinder's subjective reasoning process.
>
> Once this Court found the evidence sufficient to support felony child endangering, (see Opinion, at 11-12), this Court should have overruled the third assignment of error. Even if the trial court's verdicts were inconsistent, the inconsistency provided no basis

> for sustaining an insufficient-evidence assignment of error. * * *

(1-24-02 Motions, at 8-10) The prosecution went on to note that an inconsistency in verdicts, even in a bench trial, would not provide a basis for reversal, citing several cases, including ***Powell*** and ***Harris v. Rivera***, 454 U.S. 339 (1981). The State hastened to add that there was no inconsistency between the verdicts. See Argument, Parts C & D, ***infra***. (1-24-02 Motions, at 13-14)

In a response filed on February 4, 2002, respondent conceded that she "did not assign inconsistent verdicts as error," but she also contended that the appellate court "did not reverse on that basis." (2-4-02 Response, at 1) Respondent contended that "[a] reviewing court may look to the findings of the trial court in assessing the sufficiency of the evidence." (***Id***. at 3)

In a memorandum decision rendered on April 30, 2002, the appellate court denied the prosecution's motions. (Appx. at 46-49) The court conceded that reversal had not been "predicated upon an inconsistency in finding appellant not guilty of involuntary manslaughter and guilty of felonious endangering of her child." (Appx. at 47) The court also conceded that there are "differences between proximate cause of death by involuntary manslaughter and proof of serious physical harm resulting from recklessly violating a duty of care and protection to the child * * *." (Appx. at 47-48)

Even so, the court contended that it was correct to sustain respondent's claim of insufficient evidence by reference to the trial court's "specific finding" of no proximate cause of death. The appellate court repeatedly relied on the trial court's "specific finding" a total of seven times. (Appx. at

47, 48 – "specific finding"; "factual finding"; "specific findings of fact"; "the trial court specifically found"; "[s]pecifically, the trial court found"; "the trial court's findings of fact"; "the trial court, in effect, found")

The appellate court did not address the prosecution's contention under ***Jackson*** and ***Powell*** that particular findings of the factfinder are irrelevant to sufficiency review. The court instead held that its reliance on "specific findings" "came fully within" respondent's third assignment of error challenging the sufficiency of the evidence. (Appx. at 48)

Meanwhile, on February 28, 2002, the prosecution had filed a discretionary appeal in the Ohio Supreme Court, relying on ***Jackson*** and ***Powell*** for the proposition that sufficiency review does not consider specific findings of fact:

> The standard of review for sufficiency of the evidence focuses on the evidence introduced at trial to determine whether *any* reasonable trier of fact could have found the defendant guilty. It is a test of the adequacy of the evidence, not a test of the adequacy of a particular factfinder's subjective reasoning process.

(Prosecution's Memo Supporting Jurisdiction, at 2) The prosecution asserted the following proposition of law:

> **Proposition of Law No. I**: A trial court's not guilty verdict in a bench trial on one count of a multi-count indictment cannot be used as grounds on appeal to sustain an insufficient-evidence challenge to the trial court's guilty verdict on another count in the same bench trial.

(***Id***. at 7) The prosecution noted that the appellate court's error

raised a substantial constitutional question, since "[t]he test for sufficiency [is] a constitutional standard." (***Id***. at 2)

The Ohio Supreme Court declined discretionary review by way of entry filed on June 12, 2002. (Appx. at 51) This timely petition for writ of certiorari follows.

ARGUMENT

The decision below raises a conundrum. The Ohio Court of Appeals repeatedly stated that the evidence was sufficient to support conviction on the charge of felony child endangering, including the element that respondent's offense resulted in serious physical harm to the child. Despite the finding of sufficiency, however, the court proceeded to *sustain* respondent's insufficient-evidence challenge to the conviction, relying exclusively on a "specific finding" that the trial court had made regarding the count of involuntary manslaughter. In short, the court found the evidence sufficient but then found it "insufficient" based on a "specific finding" regarding another count.

This decision is breathtakingly bad on at least three levels. First, as this Court recognized in ***Jackson***, a trial court's "specific finding" has no role in an appellate court's review of the sufficiency of the evidence.

Second, the "specific finding" here pertained to another count of the indictment. As this Court recognized in ***Powell***, an inconsistent verdict on one count provides no basis for sustaining a claim of insufficient evidence to a count of conviction.

Third, the Ohio Court of Appeals has conceded that it did not reverse because of any inconsistency between the

verdicts. Given the conceded *consistency* between the "specific finding" on one count and the conviction on the other count, one naturally wonders how the "specific finding" could cast doubt on the conviction.

A. Violating the Limits of Sufficiency Review

The limits of sufficiency review were well known to the Ohio Court of Appeals. As that court recognized, "[i]n order to reverse a conviction because of insufficient evidence, an appellate court, after reviewing the evidence in a light most favorable to the prosecution must determine, as a matter of law, that no rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." (Appx. at 31) The appellate court cited a decision of the Ohio Supreme Court as setting forth the proper standard:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

State v. Jenks, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). This standard is drawn directly from ***Jackson v. Virginia***, 443 U.S. 307, 319 (1979):

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential

> elements of the crime beyond a reasonable doubt. (Emphasis *sic*)

Applying the ***Jackson*** standard, the Ohio Court of Appeals initially ruled in the prosecution's favor and rejected respondent's challenge to the sufficiency of the evidence. The court concluded that, "[c]onsidering the evidence most favorable to the state, there was sufficient proof of child endangering which caused the child's death." (Appx. at 40) "We find that the evidence was sufficient for the court to find a violation of the felony endangering child statute." (Appx. at 40)

At that point, the sufficiency analysis should have ended, but the Ohio Court of Appeals erroneously proceeded to consider that "[t]he trial court specifically found that the state had not proved beyond a reasonable doubt that child endangering was the proximate cause of William's death." (Appx. at 40) In the court's view, the finding of no proximate cause as to involuntary manslaughter meant that the element of resulting serious physical harm was lacking as to felony child endangering.

Consideration of the "specific finding" violated the ***Jackson*** standard in a fundamental way. The test for sufficiency focuses on whether *any* rational factfinder could have found the defendant guilty. As this Court recognized in ***Jackson***, the standard of review for sufficiency is a test of the adequacy of the evidence, not a test of the adequacy of the particular factfinder's subjective reasoning process:

> The question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached. Just as the standard announced today does not permit a

> court to make its own subjective determination of guilt or innocence, it does not require scrutiny of the reasoning process actually used by the factfinder—if known.

Jackson, 443 U.S. at 319 n. 13; *see also*, ***Rivera***, 454 U.S. at 348 & n. 20 (quoting ***Jackson*** on this point). Under ***Jackson***, the trial court's "specific finding" was "wholly unrelated" to the sufficiency standard of review, but the Ohio Court of Appeals turned the "specific finding" into a linchpin for its reversal on grounds of "insufficient" evidence.

The appellate court's analysis conflicted with the sufficiency standard in another sense. The sufficiency standard construes the evidence in the light most favorable to the prosecution. But in returning its verdicts, the trial court had been exercising its plenary fact-finding authority and had not been required to construe the evidence in the light most favorable to the prosecution.

If the trial court had thought the evidence insufficient, it would have dismissed the case at the close of the evidence rather than engaging in deliberations on guilt or innocence. Deliberations on guilt or innocence are entirely *consistent* with the evidence having been sufficient. A "specific finding" announced after such deliberations does not show that the evidence was constitutionally insufficient under ***Jackson***.

The prosecution had quoted the proper Due Process sufficiency standard in its brief opposing respondent's appeal. For its part, the defense had relied on the same Due Process sufficiency standard and had not purported to rely on any "specific finding." As quoted in both briefs, that standard should have put the appellate court on notice that "specific findings" were irrelevant to sufficiency review.

After the appellate court relied on the "specific finding" *sua sponte*, the prosecution quickly brought the error to the court's attention in a timely application for reconsideration. Unfortunately, the appellate court did not even acknowledge ***Jackson***'s admonition not to consider the factfinder's subjective reasoning process in addressing sufficiency. Instead, the appellate court exacerbated its violation of the ***Jackson*** standard, repeatedly relying on the trial court's "specific finding" a total of seven times. (Appx. at 47-48)

When the prosecution cor plained that it had been unfairly surprised by the appellate court's *sua sponte* reliance on an unbriefed, new issue, the court brushed that complaint aside. The appellate court wrongly said that its ruling (*i.e.*, its reliance on the "specific finding") "came fully within the third assignment of error raised by appellant, which is that appellant's conviction was not supported by sufficient evidence." (Appx. at 48) In fact, the appellate court's ruling had constituted either hopeless confusion or outright defiance over the ***Jackson*** standard. Such confusion or defiance was all the more difficult to accept for the prosecution because the appellate court had actually found the evidence sufficient under the ***Jackson*** standard.

B. Inconsistent Verdicts Provide No Basis for Reversal on Insufficient-Evidence Grounds

The appellate court's analysis fares no better under the "inconsistent verdict" line of cases. The trial court had known that it could find respondent guilty of felony child endangering only if the offense resulted in serious physical harm to the child. The trial court had said so during a colloquy in closing arguments, saying that "[subsection] E(1)(c) (*sic*) makes it a

third degree felony, if the violation results in serious physical harm, and I believe she was indicted as a felony of the third degree * * *." (Tr. 711-12) When the trial court later found respondent guilty as charged of a third-degree felony, the trial court was necessarily finding that the offense resulted in serious physical harm to the child. The Ohio Court of Appeals has repeatedly conceded that the trial court found respondent guilty of the felony child endangering offense. (Appx. at 30 – "she was found guilty of the felony endangering child offense"; Appx. at 47 – "The court has, at all times, been aware that the trial court found appellant guilty of felony endangering.")

Nevertheless, the Ohio Court of Appeals seemed to perceive an inconsistency. The reasoning seemed to be that the trial court had found that there had been no proximate cause as to death vis-à-vis involuntary manslaughter, and so the resulting-serious-physical-harm element must have been lacking for felony child endangering too.

As the prosecution pointed out in its application for reconsideration, however, an inconsistency in verdicts provides no basis for reversal on insufficient-evidence grounds. This Court said so in ***United States v. Powell***, 469 U.S. 57, 67 (1984):

> [W]e note that a criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. *This review should not be confused with the problems caused by inconsistent verdicts.* Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable

> doubt. *This review should be independent of the jury's determination that evidence on another count was insufficient.* (Emphasis added; citations omitted)

Like ***Jackson***, ***Powell*** shows that the appellate court committed fundamental error. Even if the trial court's "specific finding" vis-à-vis involuntary manslaughter was inconsistent with the guilty verdict on felony child endangering, such an inconsistency provided no basis for the appellate court to consider the "specific finding" as part of its sufficiency review. An "inconsistent" verdict or finding is simply irrelevant to sufficiency review, and that review on the count of conviction must occur *independent* of the factfinder's acquittal of the defendant on another count.

Nor is there any basis to distinguish between inconsistent verdicts in a jury trial and inconsistent verdicts or findings in a bench trial. The identity of the factfinder is irrelevant to the scope of sufficiency review, and therefore the fact that respondent's trial was a bench trial "is of no constitutional significance." ***Jackson***, 443 U.S. at 317 n. 8. The Ohio Court of Appeals simply had no business relying on a "specific finding" to sustain a challenge to the sufficiency of the evidence.

In its memorandum decision denying reconsideration, the Ohio Court of Appeals did not address the prosecution's reliance on ***Powell***. Instead, it said that it was not relying on any inconsistency at all: "The result in this case was not predicated upon an inconsistency in finding appellant not guilty of involuntary manslaughter and guilty of felonious endangering of her child." (Appx. at 47) The appellate court even agreed with the prosecution's view that there are "differences between proximate cause of death by involuntary manslaughter and proof of serious physical harm resulting

from recklessly violating a duty of care and protection to the child * * *." (Appx. at 47-48) Given those differences, the prosecution agrees that there was no inconsistency.

C. A Consistent Finding on Another Count is No Basis for Reversal on Insufficient-Evidence Grounds

Since an inconsistent verdict or finding on another count is irrelevant to sufficiency review, it stands to reason that a *consistent* finding on another count would be equally irrelevant.

As the prosecution argued below, the verdicts were reconcilable under Ohio law. The appellate court agreed that there are differences between the kind of causation necessary for involuntary manslaughter and the kind of causation necessary for felony child endangering. For involuntary manslaughter, the defendant must cause the death as a *proximate* result of the felony or misdemeanor. O.R.C. 2903.04. Thus, the prosecution must prove not only cause-in-fact but also proximate cause in order to draw the causal connection between the predicate endangering offense and the death. But for child endangering, the offense need only "result" in the required serious physical harm to raise the offense to a third-degree felony. By using "proximate result" in the first statute, but by only using "result" in the second statute, the Ohio General Assembly has made it plain that it only requires cause-in-fact for purposes of felony child endangering.

A second difference arises out of the fact that death is the required harm for involuntary manslaughter, while only serious physical harm is required for felony child endangering. Even if proximate cause is required under both statutes, the trial court could have legitimately believed that serious

physical harm was foreseeable for purposes of felony child endangering while death was not foreseeable for purposes of involuntary manslaughter. "Serious physical harm" establishes a relatively low threshold in comparison to death, since "serious physical harm" can result from even a burn that leaves a scar. See O.R.C. 2901.01(A)(5)(d) ("permanent disfigurement"). The trial court could have believed that it was foreseeable that young William would burn himself while playing with fire but that it was not foreseeable that William would be so far beyond help that he would die from such a fire.

In this context, the trial court's "specific finding" of no proximate cause of death vis-à-vis involuntary manslaughter did not cast doubt on the existence of resulting serious physical harm for felony child endangering. There could be a lack of proximate cause of death and yet still be serious physical harm that resulted. Even if the "specific finding" could play a role in the appellate court's sufficiency review, it provided no basis to find the evidence insufficient on felony child endangering.

D. The Inapplicability of Collateral Estoppel

Respondent might try to contend that the "specific finding" of no proximate cause of death under Count One collaterally estopped the prosecution from proving that the offense resulted in serious physical harm under Count Two. However, the appellate court has effectively conceded that no collateral estoppel could apply. It has acknowledged the differences between proximate cause of death vis-à-vis involuntary manslaughter and resulting serious physical harm vis-à-vis felony child endangering. It has conceded that its reversal was not based on any inconsistency.

Given those concessions, the "specific finding" of no proximate cause of death is reconcilable with the trial court finding the element of resulting serious physical harm. The prosecution questions whether collateral estoppel should apply to verdicts returned in the same trial. But even if it can, respondent would need to show that the factfinder actually and necessarily decided a fact of consequence in her favor. ***Schiro v. Farley***, 510 U.S. 222, 233, 236 (1994). The "specific finding" of no proximate cause of death did not actually or necessarily determine that there was no resulting serious physical harm. One did not equate to the other, and so a collateral estoppel argument would fail.

Respondent has seemed to argue that the trial court's general verdict of guilt on felony child endangering would somehow be trumped by its "specific finding" of no proximate cause of death under involuntary manslaughter. But such an analysis would be mistaken.

The trial court was well aware of the element of resulting serious physical harm. The trial court cited that element during closing argument as being necessary for felony child endangering, citing subsection (E)(1)(c) of the statute. The citation was slightly off, since the element of resulting serious physical harm is found in subsection (E)(2)(c). Even so, the trial court had the substance of the law correct, and so when the trial court thereafter specifically referred to subsection (E)(1)(c) in finding respondent guilty of the felony endangering offense, the trial court for all intents and purposes was making a specific finding of the existence of resulting serious physical harm. One specific finding would not trump another specific finding.

A "specific finding" would not trump a general verdict anyway. Under Ohio law, a general verdict of guilty as

charged of the third-degree felony was perfectly acceptable. Oh.Crim.R. 23(C); O.R.C. 2945.75(A)(2).

In any event, this kind of "rock, paper, scissors" approach to collateral estoppel should be rejected. Respondent would have the burden of demonstrating that the element of resulting serious physical harm was necessarily resolved in her favor, and she simply cannot make that showing when the court found her guilty under Count Two, and when the "specific finding" was reconcilable with guilt. Even if the "specific finding" was entirely inconsistent with guilt on Count Two, collateral estoppel does not apply to inconsistent verdicts in the same trial. *See* ***Powell***, 469 U.S. at 68.

CONCLUSION

In light of the foregoing, petitioner State of Ohio respectfully requests that this Court grant the petition for writ of certiorari, so that this Court can correct the appellate court's fundamentally mistaken or defiant views on the federal question of sufficiency of the evidence.

Respectfully submitted,

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Asst. Pros. Attorney

Counsel for Petitioner

September 2002

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2001

STATE OF OHIO,
Petitioner,

-vs-

ANGEL M. TORR,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS, TENTH APPELLATE DISTRICT

APPENDIX

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APPENDIX A

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,

Plaintiff-Appellee,

v.
Angel M. Torr,

Defendant-Appellant.

No. 00AP-1418
(REGULAR CALENDAR)
[filed January 15, 2002]

O P I N I O N
Rendered on January 15, 2002

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

McCORMAC, J.

William Welch, the five-year-old son of defendant-appellant, Angel M. Torr, died in a fire at the family home on July 5, 2000. Angel M. Torr was charged with a two count offense as a result of his death. Firstly, she was charged with involuntary manslaughter, in violation of R.C. 2903.04, and

secondly she was charged with endangering her child, in violation of R.C. 2919.22(A), a felony of the third degree.

Appellant waived her right to trial by jury and, following a trial to the court, she was found guilty of the felony endangering child offense and not guilty of involuntary manslaughter. The trial court sentenced her to a three-year term of imprisonment.

Appellant appeals, asserting the following assignments of error:

> FIRST ASSIGNMENT OF ERROR: Focus on irrelevant matters not bearing on proof of the elements of the offenses charged constituted prosecutorial misconduct requiring reversal.
>
> SECOND ASSIGNMENT OF ERROR: The Court erroneously overruled an objection to irrelevant testimony concerning appellant's use of funds collected before her son's funeral.
>
> THIRD ASSIGNMENT OF ERROR: Appellant's conviction was not supported by sufficient evidence.
>
> FOURTH ASSIGNMENT OF ERROR: Appellant's conviction was against the manifest weight of the evidence.
>
> FIFTH ASSIGNMENT OF ERROR: The court erroneously overruled appellant's motion for acquittal pursuant to Criminal Rule 29.

First, we combine the third, fourth and fifth assignments of error for discussion as they are interrelated.

Appellant asks us to reverse her conviction on the grounds that it was not supported by sufficient evidence as a matter of law; that the trial court's judgment was against the manifest weight of the evidence; and that the court erred in overruling her motions for acquittal at the conclusion of the state's evidence and at the close of all of the evidence.

In order to reverse a conviction because of insufficient evidence, an appellate court, after reviewing the evidence in a light most favorable to the prosecution must determine, as a matter of law, that no rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. The appellate court may not resolve evidentiary conflicts in the defendant's favor nor substitute its assessment of the credibility of the witnesses for that of the trier of fact.

In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

The standard for reviewing the denial of a motion for judgment of acquittal and the test for determining the sufficiency of the evidence are the same. *State v. Fisher* (Oct. 17, 2000), Franklin App. No. 99AP-1497, unreported.

In considering a manifest weight argument, a reviewing court is required to engage in a limited weighing of the evidence to determine whether there is enough competent credible evidence to permit reasonable minds to find guilt beyond a reasonable doubt. Issues of witness credibility and a weight to attach to specific testimony still remain primarily

within the province of the trier of fact, whose opportunity to make those assessments is superior to that of the reviewing court. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231. Nevertheless, the appellate court must review the entire record and, after according deference to the role of the trier of fact, the reviewing court must weigh the evidence and all reasonable inferences and consider the credibility of witnesses to determine whether the trier of fact clearly lost its way creating a manifest miscarriage of justice so that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against a conviction.

Keeping these tests in mind, we now review the facts that are pertinent to the determinations which we must make.

First we will review the circumstances of the fire and the resulting death. William Welch, age five, lived with appellant, Angel Torr, in a two-story townhouse apartment located near the end of a dead-end street among a group of duplexes. William's twelve-year-old aunt, Nicole Torr, and her mother's boyfriend, Zach Trout, stayed in the home with appellant and her son on the night before the fire and remained there the following day. Nicole Torr is the younger half sister of Angel Torr and was employed as a live-in babysitter for William during her summer vacation from school while appellant worked long and sometimes irregular hours at a combination laundry and bar.

On the afternoon of July 5, 2000, while William played outside, the other three occupants of the apartment were inside watching television. All three smoked cigarettes and used one or more plastic lighters. Around 4:00 p.m. Angel and Zach decided to go to the grocery store to buy food

for the evening meal. Before leaving, they testified that they picked up the smoking materials. Appellant gave Nicole a note to take across the street to her grandmother's house and told Nicole that she would locate William and instruct him to come home to check in with her. Nicole walked across the street as Angel and her boyfriend were leaving. They drove up the street and saw William with a friend at the church parking lot. Appellant told her son to check in with Nicole and looked back to make sure he headed home as she and her boyfriend continued to the store. William arrived home, while Nicole was still across the street at the home of her grandmother. After delivering the note from appellant, Nicole borrowed her grandmother's telephone to call her own mother. During her conversation, the grandmother heard William calling his aunt's name. They went outside and began crossing the street to find out what the boy needed. Nicole noticed smoke emerging from the upstairs front window of the townhouse. The grandmother instructed Nicole to call 9-1-1 and to get a fire extinguisher from her home. As they attempted to rescue William from the burning unit, she said the fire in the living room was like a bonfire going clear to the ceiling. She went inside the front door and tried to go upstairs but the stairway was on fire and the smoke was too thick. Flames were coming from the area of a love seat in the living room near the stairway. She went outside and yelled at William to break the front bedroom window but the last she heard him say was "grandma I can't do it, I can't do it."

Fire personnel from both Westerville and Columbus arrived soon thereafter. At trial, various firemen described the intensity of the fire, their efforts to extinguish it and their futile attempts to save the boy trapped inside. William's body was found near the front bedroom window. The bathroom sink faucet was on with water running over three or four plastic bottles.

The state fire inspector, Harry Barber, who was qualified as an expert, testified concerning his examination of the fire scene and analysis of the fire. Barber explained in detail his reasons for concluding that the fire started on the love seat beneath the stairway. This was the seat where one or more of the three people that were smoking in the apartment had been sitting prior to leaving for the store. Barber was of the opinion that the fire was of human origin as opposed to being mechanical or electrical in nature. All the evidence indicated that the fire had started in the love seat. He ruled out the electrical outlet in that area as being the cause of the fire. He also was of the opinion that the fire had not commenced due to a smoldering cigarette or from a cigarette butt that was on the carpet near the love seat. The cigarette had not been consumed completely by the fire, and Barber stated that it takes a much longer time for a fire originating from a smoldering cigarette butt to gain momentum, opining that the time was simply not sufficient for that to have taken place. He felt that the fire had been started by something more in the nature of a cigarette lighter or a pyrotechnic device, like a sparkler or fireworks. There was no evidence of a cigarette lighter or pyrotechnic device in the vicinity of the love seat. There was no search in the upstairs part of the house. The fire inspector identified the general cause of the fire within a reasonable degree of scientific certainty, but he was unable to identify the exact cause of the fire. He did state that the fire was definitely of human origin from a device such as has been previously described. The most reasonable inference from Barber's testimony is that the fire was started by a device that accelerated rapidly after appellant, Trout and Nicole exited the premises. The logical explanation given the force of his testimony is that the victim started the fire. This inference is reinforced by evidence of William's history of curiosity or fascination with fire and his past fire starting behavior.

There was testimony that William had been involved in as many as nine incidents involving setting fires from the summer 1999 until April 2000. The most serious of these incidents was a chair fire during March 2000 that caused significant damage in an upstairs bedroom. Immediately following the March chair fire, the Westerville Fire Department public education officer Douglas Arter, who oversees the department's juvenile fire starter program, contacted appellant to advise of the potential benefits to William and her from participating in the program. During the initial meeting, William admitted to the officer that he had accidentally started the chair fire while playing with a cigarette lighter. A few days later, appellant and her son met with Arter again so that the officer could assess the level of William's curiosity with fire. The officer concluded that the boy had a moderate curiosity based upon the recent incident and two previous occurrences divulged by appellant during the evaluation interview. After concluding that William would benefit from participating in the voluntary educational program, he advised appellant of his conclusion and strongly recommended that they participate in the program.

Several other witnesses confirmed that appellant had been made aware of William's involvement with fires or lighters and some of the testimony indicated that the problem was serious and continuing.

The first instructional session was scheduled with Arter but appellant and her son did not attend. When contacted, appellant explained that William had been at the home of his paternal grandfather. She claimed to have left a voice mail message to that effect for the officer but he did not recall receiving the message. Arter said that he was the sole person giving this instruction and that neither appellant nor her

son attended any of the educational sessions. He stated that during a follow-up telephone conversation with appellant, he told her that, unless there was intervention, the fire setting behavior would probably continue. Appellant had stated that she would bring her son to a session or sessions but she did not attend when she found out that she was required to attend as well.

Appellant's response in lieu of the offered instruction was to discipline her son, primarily by scolding him and by withholding privileges. Appellant and other relatives talked to the boy about the dangers of fire and verbally discouraged him from playing with lighters, matches or stoves.

One of the circumstances observed at the fire scene was that water was running in the upstairs bathroom over several plastic containers giving rise to an inference that the victim may have attempted to fill containers to extinguish the fire himself to avoid punishment.

The fire inspector had stated that with the fire starting in the lower level it would accelerate rapidly, closing off a downstairs means of exiting the premises.

In summary, the evidence was sufficient to find beyond a reasonable doubt that the fire had been commenced by William using some sort of incendiary device such as a cigarette lighter. There was no evidence as to how William obtained the cigarette lighter if that were the object used. The three persons who left the duplex shortly before William arrived home testified that they removed all cigarette lighters. Consequently, there was no proof that appellant negligently left a cigarette lighter or other incendiary device to which William could have access to start a fire.

The state also presented evidence concerning the quality of supervision provided by and the babysitting abilities of William's twelve-year-old aunt, Nicole Torr. She completed the seventh grade in June 2000 and was hired to watch her nephew during the summer months while appellant worked or was otherwise away from home. In short, Nicole was a live-in babysitter who often had the child for substantial periods of time that may have been as much as twelve to sixteen hours. Although appellant had been a good housekeeper prior to her taking on additional work, the housekeeping had deteriorated severely. Some witnesses did not feel that Nicole was mature enough to baby sit full-time and questioned her supervision of William. A compensating factor was that Nicole's grandmother lived across the street and there were friends or relatives in the immediate vicinity. However, Nicole, the twelve-year-old, was a smoker as were the other two occupants of the duplex.

The trial court found defendant not guilty of involuntary manslaughter but guilty of endangering children stating:

> What is relevant and what I do find is that a five-year-old boy, the natural son of the defendant – the defendant is sole guardian and legal custodian – lost his life in a horrific tragedy. What I also find is that the State has failed to prove beyond a reasonable doubt how the fire actually started. There's a natural desire to hold one accountable for the loss of an innocent child's life. However, the law provides the State must prove that act was indeed criminal, and must prove it beyond a reasonable doubt.
>
> Before I can address Count One, which is the involuntary manslaughter charge, I must address Count

Two, the endangering charge; for, if the defendant is found not guilty of Count Two, she cannot, under the State's theory, be found guilty of Count One.

I find that the defendant had ample notice of William's fixation with fire; that you neglected to correct that problem by attending the fire starter classes with him; that your 12-year-old half sister was neither mature nor responsible enough to be in loco parentis for William; that it is incredibly reckless for you to smoke and/or allow your boyfriend and/or your 12-year-old baby-sitter to smoke in your home, when you knew that William had a history of starting fires.

I also found that it was irresponsible to leave for the store, knowing that your baby-sitter was not home, telling your son who was clear up on the corner of Cleveland Avenue – and you're right, I did go out to the scene, I saw how far it was from the residence to Cleveland Avenue, and that is a substantial distance for a five-year-old – telling your son clear up on the street, on Cleveland Avenue to go home and check in, which he did, only to find that there was no adult or any supervision present. I do find that you created a substantial risk to the safety of your child by violating your duty of care of protecting him. I thus find you guilty of endangering children, in violation of Section 2919.22 (A), and under subsection E (1) (c) [sic] that is a felony of the third degree.

However, I do not find that the State has proved beyond a reasonable doubt that child endangering was the proximate cause of William's death, insofar as the State has failed to prove beyond a reasonable doubt that cause of the fire. The State has failed to prove that

> the defendant's unlawful acts set in motion a sequence of events leading to William's death. I do not find that your acts constituted foreseeability under the statute, and as such I must find you not guilty of Count One, the involuntary manslaughter. [Tr. 738-741.]

In order to determine whether the foregoing facts are sufficient to constitute proof beyond a reasonable doubt of felony child endangering, we must examine the elements of that offense.

The elements of felony endangering children under the provisions of R.C. 2919.22(A) and (E)(2)(c) are as follows: (1) being a parent or person with custody or control of a child under eighteen years of age; (2) create a substantial risk to the health or safety of the child; (3) by recklessly violating a duty of care, protection or support; and (4) commission of the offense results in serious physical harm to the child.

R.C. 2901.01(A)(8) defines "Substantial risk" to mean "a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist." Additionally, to obtain a conviction, the state must prove, beyond a reasonable doubt, that the accused acted recklessly. *State v. McGee* (1997), 79 Ohio St.3d 193. "A person acts recklessly when, with heedless indifference to the consequences, he [or she] perversely disregards a known risk that his [or her] conduct is likely to cause a certain result or is likely to be of a certain nature." R.C. 2901.22(C).

The key elements in this case are whether appellant created a substantial risk to the health or safety of her child by recklessly violating a duty of care, protection or support. There is no doubt that she was a parent with custody and

control of her five-year-old child and that, if the fire resulted from recklessly violating a duty of care and protection to the child, that it resulted in serious physical harm, *i.e.*, death to the child.

It was not necessary that the state establish the exact cause of the fire in order to prove child endangering, but only that appellant's failure to provide adequate protection for her child was reckless and created a strong possibility that serious harm would occur as a result. Considering the evidence most favorable to the state, there was sufficient proof of child endangering which caused the child's death. A reasonable trier of fact could find that the human agency was the child and the source of the fire was a cigarette incendiary or other device or object which had come into possession of the child to be used to start the fire. The substantial risk was created by setting in motion the series of events which led to the serious harm which, according to the prosecution's evidence, was neglecting to obtain sufficient professional help to alleviate or eliminate the child's fascination with fire. Additional factors were the presence of smoking and lighters in the house which may have been a source of the fire or the object of continued fascination by the child with fire, the inadequate supervision of the child by failure to obtain a more responsible babysitter or failing to see that there was supervision of the child when he arrived home. We find that the evidence was sufficient for the court to find a violation of the felony endangering child statute.

However, there is a problem with the trial court finding appellant guilty of felony child endangering in light of the fact that R.C. 2919.22(E)(1)(C) requires the child endangering described in R.C. 2919.22(A) to be the result of serious physical harm to the child. The trial court specifically found that the state had not proved beyond a reasonable doubt that child endangering was the proximate cause of William's death.

Thus, the additional element required to convert the first degree misdemeanor for a violation of R.C. 2919.22(A) was lacking and the trial court found appellant guilty of only a violation of R.C. 2919.22(A) which under R.C. 2919.22(E)(2)(c) is a misdemeanor of the first degree. The evidence, as noted, was sufficient to support that offense.

Therefore, we sustain appellant's third assignment of error to the extent that the trial court's judgment of felony child endangering is reversed. The trial court is instructed to revise its judgment entry to show conviction of child endangering under R.C. 2919.22(A), a lesser included offense, and to resentence appellant for violation of a first degree misdemeanor.

Appellant's fourth and fifth assignments of error are overruled.

Appellant's first and second assignments of error are combined for discussion.

Appellant argues that the trial court improperly admitted irrelevant testimony concerning her behavior after the death of her son and that the prosecutor's pursuit of these lines of questioning constitute prosecutorial misconduct requiring reversal of her conviction.

There was evidence that the neighbors collected money after the child's death prior to funeral services for him. The prosecution called Zach Trout, appellant's then boyfriend as a witness and asked him about the existence and use after William's death of a fund for his funeral and burial. The defense objected to the inquiry on the grounds that the evidence was not relevant. The court nonetheless allowed testimony that appellant used some funds to purchase clothing

and to rent a hotel room. The prosecutor asked if a stretch limousine with a bar was arranged to transfer appellant to her son's funeral. The witness responded that a limousine was used but he does not know who ordered it and that the bar was empty. He also explained that the limousine was not just for appellant but several people rode to the funeral in that vehicle.

The prosecutor also inquired about a "yard party" following the funeral at the home of appellant's grandmother who lived across the street from the location of the fatal fire. The witness refused to characterize the gathering as a party, stating that it was more like a picnic "for everyone to come together *** just saying prayers for Will." The prosecutor also attempted to note that appellant purchased or was in possession of a large number of newspapers with her picture on the front page. The witness stated that he did not know anything about that but through another witness without objection it was observed that appellant had a large stack of newspapers dated July 6, 2000, with her picture on the front page. During defense counsel's direct examination, appellant's mother explained that a friend of appellant arranged for the limousine and that a number of family members and friends rode in the limousine. She also related that people returned to her house after the funeral where they ate food donated by her former employers and labor union as well as friends and neighbors. She described the gathering as what people usually do after the funeral of a loved one. She explained that neighbors solicited the money donations and that the family did not ask them to do so.

In short, this testimony was quite limited and an explanation that was provided; there was no prejudice to appellant. Obviously from the tenor of the trial court's remarks and conduct of the trial, this evidence was disregarded and had no effect on the decision made by the trial court.

We do agree, however, that the evidence was not relevant. Apparently it was brought in by the prosecution to attempt to show that appellant's son was a nuisance to her and that she did not regret his death. The entire evidence refutes this theory that was apparently triggered by testimony of a next door neighbor who was not friendly with appellant. While the trial court should have sustained an objection to the testimony based on relevancy, there was no harm. The prosecution argues that it was to refute a statement in another witnesses' testimony that appellant deeply loved and grieved for her son. We do not find it relevant for that purpose. People grieve in different ways and conduct funerals and post-funeral gatherings in different ways. The trial court noted that this was not the issue in the case and, as stated before, limited the testimony for the most part and rejected whatever was adduced.

Even if the evidence had enough limited relevance to survive a challenge under Evid.R. 401, it still failed to satisfy the test of Evid.R. 403(A) which states that relevant evidence is not admissible if its probative value is substantially outweighed by a danger of unfair prejudice.

The trial court noted in sentencing appellant that the child was the center of her life and she had suffered severely because of his tragic death. Given the presumption that the trial court considers only credible and admissible testimony, we find no reversible prejudice.

Appellant also asks that we find prosecutorial misconduct in connection with the solicitation of such evidence. Although the prosecutor may have gone further than he should, probably it was not misconduct in that one witness did state that appellant had blurted out at one time that she

wished her son was dead. Her testimony was completely refuted by substantial other testimony, all of which tended to support the proposition that appellant loved her child as was found by the trial court. Also as we have previously discussed, there was no harm to appellant by introduction of this testimony which seemed to irritate the trial court rather than assist the state's cause.

Appellant's first and second assignments of error are overruled.

Appellant's first, second, fourth and fifth assignments of error are overruled. Appellant's third assignment of error is sustained. The judgment of the trial court is reversed, and this case is remanded to the trial court to enter a judgment of guilty of child endangering under R.C. 2919.22(A), and to resentence appellant for violation of a first degree misdemeanor.

Judgment reversed and remanded.

TYACK, P.J., and BOWMAN, J., concur.

McCORMAC, J., retired of the Tenth Appellate District, assigned to active duty under the authority of Section 6(C), Article IV, Ohio Constitution.

APPENDIX B

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,

Plaintiff-Appellee,

v. No. 00AP-1418
Angel M. Torr, (REGULAR CALENDAR)
[filed January 15, 2002]

Defendant-Appellant.

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on January 15, 2002, appellant's first, second, fourth and fifth assignments of error are overruled. The third assignment of error is sustained. It is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with said opinion. Costs assessed against appellee.

McCORMAC, J., TYACK, P.J., & BOWMAN, J.
/s/ John W. McCormac
Judge John W. McCormac, retired of the Tenth Appellate District, assigned to active duty under the authority of Section 6(C), Article IV, Ohio Constitution.

APPENDIX C

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,

Plaintiff-Appellee,

v. No. 00AP-1418

Angel M. Torr, (REGULAR CALENDAR)
[filed April 30, 2002]

Defendant-Appellant.

MEMORANDUM DECISION

Rendered on April 30, 2002

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

ON MOTIONS

McCORMAC, J.

The State of Ohio, plaintiff-appellee, has filed three motions relating to this court's January 15, 2002 opinion. Those motions are a motion for reconsideration, a motion to certify a conflict and a motion for stay pending appeal.

The motion for stay pending appeal is denied. Appellant has been released on a reporting recognizance bond by the trial court and the resentencing hearing ordered by this court in its opinion of January 15, 2002 has been continued pending the state's efforts to seek further review by the Ohio Supreme Court. There is no need for this court to issue a stay.

Appellee's motion to certify a conflict to the Ohio Supreme Court is denied. The opinion in this case is not in conflict with the opinion of the First District Court of Appeals in *State v. Pies* (1999), Hamilton App. No. C-990241. The result in this case was not predicated upon an inconsistency in finding appellant not guilty of involuntary manslaughter and guilty of felonious endangering of her child. Instead, the court predicated the reversal upon a specific finding of fact which applied to the guilty finding to the extent that the factual finding only supported a guilty finding of negligent endangering of her child.

Appellee requests reconsideration for several reasons. First, appellant submits that we committed an obvious error when we said that, "the trial court found appellant guilty of only a violation of R.C. 2919.22(A), which *** is a misdemeanor of the first degree." This contention is obviously taking the statement in the opinion out of context. The court has, at all times, been aware that the trial court found appellant guilty of felony endangering. The statement, as is obvious from any reasonable reading of the opinion, relates back to the application of the trial court's speeific findings of fact to the elements of both negligent and felonious endangering of a child.

We were also aware of the differences between proximate cause of death by involuntary manslaughter and

proof of serious physical harm resulting from recklessly violating a duty of care and protection to the child, which results in serious physical harm. The problem, as we explained in our opinion of January 15, 2002, is that the trial court specifically found that the state failed to prove that appellant's unlawful acts set in motion a sequence of events leading to the child's death. The acts to which the trial court was referring were the actions or inactions relating to the child's problem with setting fires. Specifically, the trial court found that there was no proof that those reckless acts caused harm to the child. That only left negligent acts (a failure to secure an appropriate babysitter or the lapse of time before the babysitter arrived) that resulted in harm. The reckless acts had no causal relationship to the harm suffered applying to the trial court's findings of fact to the elements of negligent child endangering and felony. The trial court, in effect, found that appellee failed to meet its burden of proof of anything other than negligent child endangering. The trial court's judgment of felonious child endangering was erroneous.

Appellee further contends that there was lack of notice of the ground upon which this court reversed the judgment of the trial court. The issue upon which the court decided the case came fully within the third assignment of error raised by appellant, which is that appellant's conviction was not supported by sufficient evidence. It was not supported by sufficient evidence if an element of felonious child endangering was not proved. Although this court, in its research in consideration of the issues, sustained the third assignment of error for a reason somewhat different than argued by appellant's counsel, that is not unusual. The elements of felonious child endangering were listed in the briefs of the parties.

All of the motions of the state of Ohio are overruled.

Motion for reconsideration, motion to certify and motion for stay pending appeal denied.

TYACK, P.J., and BOWMAN, J., concur.

McCORMAC, J., retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

APPENDIX D

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,

Plaintiff-Appellee,

v. No. 00AP-1418

Angel M. Torr, (REGULAR CALENDAR)
[filed April 30, 2002]

Defendant-Appellant.

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on April 30, 2002, it is the order of this court that the motion for reconsideration, the motion to certify a conflict, and the motion for stay pending appeal are denied.

McCORMAC, J., TYACK, P.J., & BOWMAN, J.

By /s/ John W. McCormac
Judge John W. McCormac, retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

APPENDIX E

THE SUPREME COURT OF OHIO

State of Ohio,
Appellant/Cross-Appellee,

Case No. 02-365

v.

ENTRY
[filed June 12, 2002]

Angel M. Torr,
Appellee/Cross-Appellant.

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and leave to cross-appeal and dismisses the appeal and cross-appeal as not involving any substantial constitutional question.

COSTS:
Docket Fee, $40.00, paid by Ron O'Brien, Prosecuting Attorney.
COSTS:
Docket Fee, Affidavit of Indigency filed.
(Franklin County Court of Appeals; No. 00AP1418)

/s/ Thomas J. Moyer
Thomas J. Moyer
Chief Justice

APPENDIX F

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO,
Plaintiff,
vs.

Case No. 00CR-08-4842
Judge O'Neill

ANGEL M. TORR,
Defendant.

TRANSCRIPT OF PROCEEDINGS [pp.737-741]

THE COURT: This case was especially difficult for me to sit as both the trier of the fact and the judge of the law. After carefully reviewing and considering all of the evidence and weighing the evidence and assessing the credibility of those who testified, we still come down to the one threshold issue, and that is: Did the State of Ohio prove beyond a reasonable doubt the elements of the crimes of involuntary manslaughter and child endangering?

It is of little weight to me the personal biases, prejudices, likes and dislikes of the various witnesses in the trial. Defense has attempted to claim that the credibility of a State's witness is tainted because, "She doesn't like Angel" or her own child was taken away

Likewise, the defense paraded the neighbors, friends and families and various witnesses to paint a picture of responsibility and maturity of the defendant and Nicole. Nicole is not on trial here. This type of testimony falls on deaf ears, is of little consequence.

What is relevant and what I do find is that a five-year-old boy, the natural son of the defendant - - the defendant is sole guardian and legal custodian – - lost his life in a horrific tragedy. What I also find is that the State has failed to prove beyond a reasonable doubt how the fire actually started. There's a natural desire to hold one accountable for the loss of an innocent child's life. However, the law provides the State must prove that act was indeed criminal, and must prove it beyond a reasonable doubt.

Before I can address Count One, which is the involuntary manslaughter charge, I must address Count Two, the endangering charge; for, if the defendant is found not guilty of Count Two, she cannot, under the State's theory, be found guilty of Count One.

I find that the defendant had ample notice of William's fixation with fire; that you neglected to correct that problem by attending the fire starter classes with him; that your 12-year-old half sister was neither mature nor responsible enough to be in loco parentis for William; that it is incredibly reckless for you to smoke and/or allow your boyfriend and/or your 12-year-old baby-sitter to smoke in your home, when you knew that William had a history of starting fires.

I also found that it was irresponsible to leave for the store, knowing that your baby-sitter was not home, telling your son who was clear up on the corner of Cleveland Avenue — and you're right, I did go out to the scene, I saw how far it was from the residence to Cleveland Avenue, and that is a substantial distance for a five-year-old — telling your son clear up on the street, on Cleveland Avenue to go home and check in, which he did, only to find that there was no adult or any supervision present. I do find that you created a substantial risk to the safety of your child violating your duty of care of

protecting him. I thus find you guilty of endangering children, in violation of Section 2919.22 (A), and under subsection E (1)(c) that is a felony of the third degree.

However, I do not find that the State has proved beyond a reasonable doubt that child endangering was the proximate cause of William's death, insofar as the State has failed to prove beyond a reasonable doubt the cause of the fire. The State has failed to prove that the defendant's unlawful acts set in motion a sequence of events leading to William's death. I do not find that your acts constituted foreseeability under the statute, and as such I must find you not guilty of Count One, the involuntary manslaughter.

[END OF EXCERPT]

APPENDIX G

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

THE STATE OF OHIO	CASE NO. 00CR-4842 January TERM, 2000
vs.	Indictment Ct. 1: F1 Involuntary Manslaughter
ANGEL TORR	2903.04 F-1; Ct 2: Endangering Children 2919.22 F-3 [filed Nov. 21, 2000]

This day again came the prosecuting attorney on behalf of the State of Ohio, the defendant being in court in custody of the Sheriff and being represented by counsel, Robert Suhr.

Thereupon the defendant in open Court waived a trial by a Jury in writing and elected to be tried by the Judge of this Court.

Thereupon the Court heard the testimony adduced and the arguments of counsel and after due consideration finds the Defendant, **NOT GUILTY OF COUNT 1, GUILTY OF COUNT 2**, as he stands charged in the Indictment.

CT 1: Involuntary Manslaughter F-1
CT 2: Child Endangering F-3

/s/ Deborah P. O'Neill
JUDGE

APPENDIX H

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO,
Plaintiff,
v.
ANGEL M. TORR,
Defendant.

Case No. 00CR-08-4842
Judge O'NEILL
[filed November 21, 2000]

JUDGMENT ENTRY
(Prison Imposed)

On November 6, 2000, came the Assistant Prosecuting Attorneys Gregory D. Slemmer and Timothy K. Mitchell on behalf of the State of Ohio, the Defendant being in Court and the Court being fully advised in the premises that the Defendant was in Court and being represented by counsel, Robert W. Suhr.

The Defendant waived her rights to a trial by a Jury and elected to be tried by the Judge of this Court on November 6, 2000.

On November 14, 2000, the Court found the Defendant **NOT GUILTY** of **Count One** of the Indictment to wit: **Involuntary Manslaughter**, but **GUILTY** of **Count Two** of the Indictment to wit: **Endangering Children**, in violation of Section **2919.22** of the Ohio Revised Code, being a **Felony** of the **Third Degree**. Bond was revoked.

The State and Defendant waived a pre-sentence investigation report and the Court proceeded immediately

to sentencing.

On November 14, 2000, a sentencing hearing was held pursuant to R.C. 2929.19. The State of Ohio was represented by Assistant Prosecuting Attorneys Gregory D. Slemmer and Timothy K. Mitchell and the Defendant was represented by attorney Robert W. Suhr. The Assistant Prosecuting Attorneys and the Defendant's attorney **did not** recommend a sentence.

The Court afforded counsel an opportunity to speak on behalf of the Defendant and addressed the Defendant personally affording her an opportunity to make a statement on her own behalf in the form of mitigation and to present information regarding the existence or non existence of the factors the Court has considered and weighed.

The Court has considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12. In addition, the Court has weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14. The Court further finds that a prison term **is not mandatory** pursuant to R.C. 2929.13(F).

The Court hereby imposes the following sentence: **THREE (3) YEARS, as to Count Two,** at the OHIO REFORMATORY FOR WOMEN IN MARYSVILLE.

Franklin County Public Defender was appointed as counsel on appeal.

The Court has considered the Defendant's present and future ability to pay a fine and financial sanction and does, pursuant to R.C. 2929.18, hereby render judgment for the following fine and/or financial sanctions: **-0-. Defendant is declared indigent.**

The total fine and financial sanction judgment is $ **-0- plus –0- costs**.

After the imposition of sentence, the Court notified the Defendant, orally and in writing, of the applicable periods of post-release control pursuant to R.C. 2929.19(B)(3)(c), (d) and (e).

The Defendant was notified of the Ohio Department of Rehabilitation and Correction's Shock Incarceration Programs and Post Release Control in writing and orally.

The Court finds that the Defendant has **ninety-one (91) days** of jail credit and hereby certifies the time to the Ohio Department of Corrections. The Defendant is to receive jail time credit for all additional jail time served while awaiting transportation to the institution from the date of the imposition of this sentence.

/s/ Deborah P. O'Neill
DEBORAH P. O'NEILL, JUDGE

cc: Assistant Prosecuting Attorney
Defendant's Attorney
Franklin County Public Defender